Nos. 18 & 24.

Motion to correct judgment.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 18, 1902.

Nos. 18 and 24.

THE SOUTHERN PACIFIC RAILROAD COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES, APPELLEE.

THE UNITED STATES, APPELLANT,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

MOTION TO OPEN AND CORRECT JUDGMENT.

JOSEPH H. CALL,
Special U. S. Attorney.

WASHINGTON, *January* 16, 1902.

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MOTION TO OPEN AND CORRECT JUDGMENT.

Comes now the United States and moves this honorable court to open and correct the judgment of the court rendered in pursuance of the opinion in the above-entitled cause on the 6th day of January, 1902, by further directing the circuit court to enter a decree in favor of the Government for those lands outside of the 20-mile limits of the grant to the Southern Pacific railroad of 1866, but within

the 30-mile limits of the grant made to that company by the act of 1871, and overlapped by the 30-mile limits of the grant to the Atlantic and Pacific Railroad Company by the act of 1866.

The court appears to have inadvertently assumed that title to the lands within the overlap of the Southern Pacific Railroad *branch line* and the Atlantic and Pacific grant were adjudicated in the *former cases* between the United States and the Southern Pacific Railroad Company, reported in 146th U. S., 570, 619, and 168th U. S., 1, 66, doubtless owing to the fact that the weight of the argument and the mind of the court was directed to the more acute controversies between the Government and the railroad company as to the conflict between the Southern Pacific *Main Line* grant of 1866 and the Atlantic and Pacific grant of the same date. We do not ask the court to reopen or reconsider any question which has been under consideration and decided by the court, but to give to the Government a decree for that large body of lands not embraced in former litigations and which are within the Southern Pacific branch line and overlapped by the Atlantic and Pacific grant, which lands are embraced by the bill and were decreed to the Government by the courts below (Record, pp. 354–362), and the titles to which lands are conceded to be in the United States.

The bill of complaint in the present suit (Record, pp. 3–37) sets forth the grant to the Atlantic and Pacific railroad, and the filing by that company of its maps of definite location, and the forfeiture of that grant within both primary and indemnity limits, and then alleges:

"And said lands were restored to the public domain, including all the odd number of sections of land for 30 miles on each side of said route of said Atlantic and Pacific Company definitely fixed as aforesaid between the eastern boundary of California and the Pacific ocean at San Buena Ventura, which lands are still owned by your orators."

The bill sought to quiet the title of the United States to all of said lands and to vacate any patents theretofore issued to any of such lands, except only those lands embraced in *former litigations* which are *there described in the bill*, and as to which lands no relief is sought in the present case (Record, pp. ~~36, 37~~). 8-18

All of the lands involved in former litigations are there described in the bill and can be readily placed upon the map showing the overlapping grants, which is found in the record in the present case at page 640, and it will be seen that a body of lands estimated at about 600,000 acres, *which were not embraced in former litigations* and *which are outside of the 20-mile limits of the Southern Pacific grant of 1866, are embraced by the bill in this case*, and that no disposition has been made of them under the judgment of the court entered on the 6th day of January, 1902, although both courts below quieted the title of the United States to these lands, and the opinion of this court concedes the title of the Government to them.

The answer of the Southern Pacific Railroad Company took issue upon the allegations of the bill as to the title of the United States to these lands (Record, pp. 55–89), and the evidence of both sides was directed to the question of ownership, and the Government, relying upon the estoppel by reason of the former adjudications as well as upon the merits, introduced in evidence the records of the cases reported in 146th U. S., 570, 619, and which records are found in the record in the present suit at pages 644 to 825.

The case of The United States *vs.* The Southern Pacific Railroad, reported in 146th U. S., 570, was brought for certain tracts of land situated within the primary or 20-mile limits of the Atlantic and Pacific grant overlapped by the primary or 20-mile limits of the grant to the Southern Pacific railroad by the act of March 3, 1871.

The case of The United States *vs.* The Southern Pacific Railroad, reported in 146th U. S., 615, 619, was brought for

certain tracts of land situated within the *indemnity limits* of the Atlantic and Pacific grant of 1866 and the primary limits of the grant to the Southern Pacific railroad, act of March 3, 1871, and in both cases this court adjudged the title to be in the United States and directed that decrees be entered by the circuit court for the relief sought.

The later case of The Southern Pacific Railroad *vs.* The United States, 168th U.S., 1–66, was brought for certain lands within the overlap of the Southern Pacific Branch Line grant and the Atlantic and Pacific grant, in which case the court said (168th U. S., 46, 47):

"The lands now in controversy are situated opposite to and are coterminous with the first, second and fourth sections of the Southern Pacific railroad as constructed between 1873 and 1877, inclusive, and within the primary and indemnity limits of the grant to the Southern Pacific Railroad Company made by the 23d section of the Texas and Pacific act of March 3, 1871; the 61,939.62 acres patented to that company being opposite to the first and fourth sections of its road. It may be said that the lands here in dispute belong to one or the other of the following classes: Lands within the common granted limits of both the Atlantic and Pacific grant of 1866 and the Southern Pacific grant of 1871; lands within the granted limits of the Southern Pacific grant and the indemnity limits of the Atlantic and Pacific grant; lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits; lands within the common indemnity limits of both grants. Of those in dispute, 219,012.93 acres have not been surveyed by the United States."

And the decree of the circuit court for *all the lands involved in that suit* and embraced within the *four classes* of land as defined by the court was entered in favor of the Government against the Southern Pacific Railroad Company and was affirmed by this court. The court rested its decision upon the authority of the cases in 146th U. S., 570, 619, and determined that the title to none of the lands within the Atlantic and Pacific Railroad grant, either *pri-*

mary or indemnity limits, could be taken by the Southern Pacific Railroad Company under its grant of March 3, 1871.

In the present case the decree of the circuit court, which was affirmed by the circuit court of appeals, quieted the title of the United States to all of the lands for which the present bill was brought except those particular lands embraced in former litigations, and which are described in the bill as well as in the decree, and except those lands sold by the Southern Pacific Railroad Company, which were dismissed from the case while in the circuit court.

The concluding paragraph of the opinion of the court in the present case, filed on January 6, 1902, and upon which the judgment of the court was entered, provides as follows:

"The decree of the circuit court of appeals of the ninth circuit, affirming the decree of the circuit court for the southern district of California will be reversed and the case remanded to the circuit court with instructions to enter a decree quieting the title of the United States to an equal undivided moiety in all alternate sections within the place or granted limits of the Atlantic and Pacific in California, so far as those limits conflict with the like limits of the Southern Pacific, excepting therefrom those lands in respect to which there has been some prior adjudication, and to dismiss the bill as to all other lands without prejudice to any future suit or action."

The court has made no disposition whatever of the 600,000 acres of land to which the Government asserted title by its bill, which title was disputed by the answer of the defendants, and to which the title of the Government is sustained by the evidence upon the merits, and by the former adjudications of this court, unless the title is disposed of in that part of the judgment which directs the circuit court "to dismiss the bill as to all other lands without prejudice to any future suit or action."

That the Government was entitled to a decree for these lands was practically conceded by counsel for the Southern Pacific Company, and is conceded by the court by reason of the prior adjudications, but the court has made no provision in its judgment for preserving the rights of the Government to them, but has directed that the decrees of the courts below be *reversed*, and then directs that a decree be entered in favor of the Government for an *undivided moiety of the lands upon the main line*, and appears to have overlooked the circumstance that these other lands upon the branch line are also embraced by the bill and by the decrees of the courts below (Record, pp. ~~34 and 353~~). E, 336

These lands for which the court has made no provision in its judgment, which are upon the Southern Pacific *branch line* and *outside of the main-line grant* to that company, and which were not embraced in any former adjudication, are among the most valuable of the lands involved in the present case, and are probably worth more than three-fourths of all the lands in suit. They are lands which are largely embraced in the United States forest reservations known as the San Bernardino, Pine Mountain, and Zaca Lake reservations. The protection of the title of the Government to these lands and the protection of these forest reserves is a matter of supreme importance to the inhabitants of southern California and is becoming more important each year. The great industries in citrus fruit culture in that part of the State are largely dependent for water supply by irrigation from these forest reserves, and it would be a great disappointment for the court to omit to quiet the title of the United States to these lands, to which relief the Government is so clearly entitled and which after years of litigation it had properly secured in the courts below.

The fact that these lands in the Southern Pacific Branch Line grant and overlap of the Atlantic and Pacific grant are involved in this suit was clearly and fully set forth and

argued in the brief for the Government. (See pages 13–18 also pages 91, 92, 95, 103.)

The annexed diagram illustrates the situation of the overlapping of the grants of the Southern Pacific branch line of 1871 and its grant of 1866 with the Atlantic and Pacific grant of the same date, and shows approximately the lands embraced in the former litigations, and as to which no relief was sought by the present bill and which were excepted from the decree in the cross-bill, and also shows the lands to which the Government is entitled to a decree and which it had in the courts below.

For the further convenience of the court there is also presented with this petition a copy of the diagram at page 640 in the record in the present suit upon which the townships of land embraced in the former litigations are marked by a cross with a blue pencil.

As before stated, the description of these lands, embraced in such former litigations and not included in the present bill, is set forth in the bill itself and in the decree of the circuit court, and the description is also given in the opinion of this court in 168 U. S., at page 24. The court will readily observe that the lands embraced in the former litigations included lands in both the indemnity and place limits of the Southern Pacific and Atlantic and Pacific grants, and that the lands to which the Government is entitled to a decree, embraced by the present bill, include the remainder of the lands of those classifications, which this court has repeatedly said are owned by the Government, and that the Southern Pacific has no right to them.

In the opinion of the court in the present case, filed on January 6, 1902, the court, quoting from the opinion in The Southern Pacific Railroad *vs.* The United States, 1, said:

'The Southern Pacific Railroad Company constructed the road thus contemplated, and claims that the lands here in dispute passed to it under the above act of 1871.'

So also on page 46:

'The lands now in controversy are situated opposite to and are coterminous with the first, second and fourth sections of the Southern Pacific railroad as constructed between 1873 and 1877, inclusive, *and within the primary and indemnity limits of the grant of the Southern Pacific Railroad Company* made by the twenty-third section of the Texas and Pacific act of March 3, 1871.'

"And on page 61 the conclusion was summed up in these words:"

'For the reasons stated, we are of the opinion that it must be taken in this case to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Railroad Company—

"1. That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866;

'2. That upon the acceptance of those maps by the Land Department the rights of that company in the lands so granted, attached, by relation as of the date of the act of 1866; and

'3. That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.

'These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below.

"Obviously the fact settled by the decisions in those cases was the filing by the Atlantic and Pacific of an approved

map of definite location. Upon that the controversy hinged. Such a map having been filed the title of Atlantic and Pacific vested as of the date of the act of July 27, 1866, and inasmuch as the Southern Pacific claimed only by a grant of date March 3, 1871, it took no title. This which is apparent from the foregoing quotation is emphasized by the full discussions in the opinions, as well as by the allegations in the pleading upon which the cases were tried. That fact having been determined must be taken in the present suit as not open to dispute. The Atlantic and Pacific did file a sufficient map of definite location of its line from the Colorado river to the Pacific ocean, and such map was approved by the Secretary of the Interior. Its title, therefore, to the land within the limits of the grant in California took effect as of date July 27, 1866. No claim of right or title arising only in 1871 and created by an act of that date could affect its title."

Throughout the entire opinion the court concedes the title of the United States to all of the lands within the Atlantic and Pacific grant, both primary and indemnity, so far as overlapped by the Southern Pacific grant of 1871, primary and indemnity, outside of the 20-mile limit main-line grant of the Southern Pacific of 1866, and thereby concurs in the view of the circuit court of appeals that the Government is entitled to a decree for these lands, but in its present form the judgment of this court reverses the decrees of the courts below for these very lands which this court as well as the courts below thinks the Government is entitled to hold

We would therefore suggest that the judgment be so modified as to affirm the decrees of the courts below as to these lands, or, if the decrees be reversed, that the circuit court be instructed "to enter a decree in favor of the Government for the alternate sections of land described by odd numbers, and embraced by the bill situated within the 30-mile limits of the Southern Pacific grant of 1871 so far as they are also within the 30-mile limits of the Atlantic and

Pacific grant of 1866, but outside of the 20-mile limits of the Southern Pacific grant of 1866."

II.

All of these 600,000 acres of land as to which we seek correction of the decree are within the limits of the Southern Pacific grant of 1871 and outside of the 20-mile limits of the Southern Pacific grant of 1866, and most of them are outside of the 30-mile or indemnity limits of the Southern Pacific grant of 1866, but a part of the lands are situated within the common-indemnity limits of the Southern Pacific grant of 1866 and indemnity limits of the Atlantic and Pacific grant.

It may therefore be claimed by the Southern Pacific that it has a naked right to select such indemnity lands to supply deficiencies within its place limits.

But such right, even if it exists, does not confer a present title or right to any tract of land until the selection has been made and approved by the Secretary of the Interior. This is the established doctrine of this court and has been lately reiterated in Hewitt *vs.* Schultz, 180 U. S., 139, and in the more recent cases of Southern Pacific Railroad *vs.* Bell and Otto Groeck, decided January 13, 1902, and in which cases the court held that the Secretary of the Interior had no power to reserve indemnity lands for the Southern Pacific railroad prior to a selection of such lands by the company. The Southern Pacific, therefore, can maintain no pre-existing right or title to such indemnity lands without having an approved selection of them any more than can a person claim and hold a part of the public domain because he is entitled under the law to make a homestead or pre-emption entry of a part of it.

The Southern Pacific Company is not entitled to select any part of the lands of the Atlantic and Pacific railroad as

indemnity or otherwise, for, as was said by this court in Chicago Railroad *vs.* The United States, 159th U. S., 372:

"No part of the lands granted in aid of the construction of one road could be applied in aid of the other road."

In Sioux City Railroad *vs.* The United States, 365, 368, the court said:

"The grants for the Sioux City and Milwaukee roads were by the same act. Of the granted sections in place limits common to both roads, each company, having filed its map of definite location, took, as of the date of the grant, an equal undivided moiety—no more. The equal undivided moiety granted for one road was not granted, nor could be used, for the other road. Congress knew, when it passed the act of 1864, that there would be an overlapping of place limits at the required point of intersection of the two roads. And the Sioux City Company when it accepted the benefit of the grant, knew that such must be the case. As the act did not provide for a selection of lands for either road, on account of the undivided moiety for place lands granted for the other, we may not assume that the right to such selection was intended to be reserved. *Lands lost to the Sioux City Company in one of the modes named in the act of Congress and for which other lands could be selected, were lands granted for that company, not lands granted to another company for a different road.* The lands which the Sioux City Company claims to have so lost—namely, the undivided moiety granted and subsequently awarded to the Milwaukee Company out of the common place limits—were never granted for the Sioux City road, but were granted for the McGregor or Milwaukee Company."

It is clear from the adjudged cases that the Southern Pacific Company cannot invade the Atlantic and Pacific grant to select indemnity therein.

However, nearly all the lands for which we seek a modification of the judgment of January 6, 1902, are wholly outside of the 30-mile limits of the Southern Pacific grant and within the Atlantic and Pacific grant, and are therefore

lands to which the Atlantic and Pacific Company had a "present or prospective right" within the meaning of section 23 of the grant of March 3, 1871.

U. S. *vs.* S. P. R., 146 U. S., 615, 619.
S. P. R. *vs.* U. S., 168 U. S., 1.

Respectfully submitted.

JOSEPH H. CALL,
Special U. S. Attorney.

To MAXWELL EVARTS, Esq., and LEWIS E. PAYSON, Esq.,
Attorneys and Counsel for the Appellants in the Above-entitled Cause, No. 18, and for the Appellees in No. 24:

You will please take notice that the United States will on the 20th day of January, A. D. 1902, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion.

JOSEPH H. CALL,
Special U. S. Attorney.

WASHINGTON, *January* 16, 1902.

APPENDIX.

It is further submitted that if the court be of the opinion that the Southern Pacific may be entitled to assert in this suit *a right to select those* lands within the *indemnity limits* of its grant of *1866* which are outside of the granted limits of the Atlantic and Pacific *grant*, but which are within the indemnity limits of the latter grant, that then the circuit court should be directed—

"to enter a decree quieting the title of the United States for "those lands embraced by the bill which are outside of the "20-mile or indemnity limits of the Southern Pacific grant "of 1866, but which are within the 30-mile limits of the "Southern Pacific grant of 1871 and within the 30-mile "limits of the Atlantic and Pacific grant, excepting there- "from those lands within the common indemnity limits of "the Southern Pacific grant of 1866 and Atlantic and Pa- "cific grant, and further quieting the title of the United "States to an equal undivided moiety in all alternate sec- "tions within the place or granted limits of the Atlantic "and Pacific in California, so far as those limits conflict "with the like limits of the Southern Pacific, excepting "therefrom those lands in respect to which there has been "some prior adjudication, and to dismiss the bill as to "all other lands without prejudice to any future suit or "action."